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The Honorable Cary Condotta
State Representative, 12th District
P. O. Box 40600
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Dear Representative Condotta:

By letter previously acknowledged, you have asked for an opinion on the meaning of the word “shall” as used in state law, and specifically as used in that portion of RCW 29A.04.611 quoted in your letter and immediately below.¹

The secretary of state as chief election officer shall make reasonable rules in accordance with chapter 34.05 RCW not inconsistent with the federal and state election laws to effectuate any provision of this title and to facilitate the execution of its provisions in an orderly, timely, and uniform manner relating to any federal, state, county, city, town, and district elections. To that end the secretary shall assist local election officers by devising uniform forms and procedures.^[2]

BRIEF ANSWER

When the term “shall” is used in a statute, a presumption arises that the term is mandatory rather than permissive. However, in all cases, the ultimate goal of statutory interpretation is to determine the intent of the Legislature. Thus, where the context of a statute indicates that the term “shall” is not intended to be mandatory, it will not be interpreted to impose a duty or obligation.

¹ Your opinion request refers to and quotes RCW 29A.04.610. That statute was repealed in the 2004 legislative session. Laws of 2004, ch. 271, § 193. However, its repeal is not significant for purposes of your question because, with one exception not relevant to your inquiry, RCW 29A.04.611 (enacted by Laws of 2004, ch. 27, § 151) is identical to the language of its statutory predecessor, RCW 29A.04.610.

² As was the case with its statutory predecessor, RCW 29A.04.611 goes on to provide that “[i]n addition to the rule-making authority granted otherwise by this section, the secretary of state shall make rules governing the following provisions”. Thereafter, RCW 29A.04.611 lists 53 provisions for the secretary’s exercise of rule-making authority; RCW 29A.04.610 listed 52.

In my opinion, the better reading of the term “shall” in the quoted language of RCW 29A.04.611 is that it is permissive. When the language of the statute is considered as a whole, and in light of its general subject, it provides the secretary of state with discretion to determine whether rules are “reasonable” and necessary to “effectuate” and “facilitate” the provisions of RCW Title 29A in an “orderly, timely, and uniform manner”. The same is true as to the level of assistance to be provided by the secretary to local election officers “[t]o that end”, by devising uniform forms and procedures.

ANALYSIS

“[T]he word ‘shall’ in a statute is presumptively imperative and operates to create a duty The word ‘shall’ in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (citing *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). However, “[t]he meaning of ‘shall’ is not gleaned from that word alone because our purpose is to ascertain legislative intent of the statute as a whole.” *Id.* As the Court in *Krall* explains, “[i]n determining the meaning of the word ‘shall’ we traditionally have considered the legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Id.* (citing *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979)).

In the statute about which you inquire, the Legislature has used the “presumptively imperative” term “shall”. *Id.* However, when one considers the whole of the statute, the nature of the act, and the consequences that would result from construing the statute one way or another, I conclude that the statute uses the term “shall” in a permissive sense.

The language of the above-quoted provision itself indicates that the secretary has considerable discretion in determining whether to adopt rules. The statute states that the secretary shall make “reasonable” rules to “effectuate” the provisions of RCW Title 29A and to “facilitate” their execution in an “orderly, timely, and uniform manner”. This language strongly suggests that the Legislature intended the secretary of state to use his considered judgment to determine whether a rule would be reasonable and necessary for the purposes identified in the statute, and that the Legislature did not intend to require the secretary to make rules regardless of his properly exercised discretion with respect to those considerations.

The conclusion that the Legislature used the term “shall” in a permissive sense in this statute further is supported by the statutory language following the above-quoted provision, referring to it as “rule-making *authority* granted otherwise by this section”, rather than a rule-making obligation or duty. RCW 29A.04.611 (emphasis added); *see* note 2. On the whole, then, the statutory language expresses an evident intent that rules be made to the extent the secretary determines that they are appropriate to effectuate and facilitate “orderly, timely, and uniform” implementation of the provisions of RCW Title 29A, but not otherwise.

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The result of a contrary interpretation also argues against concluding that the Legislature used the term “shall” in a mandatory sense in RCW 29A.04.611. A contrary interpretation would require rulemaking when there may be no need for rules. For example, statutory provisions themselves often are sufficiently comprehensive that administrative rules would add nothing meaningful. I believe a court would be very hesitant to conclude that, even where that is the case, the Legislature intended for the secretary to make rules.

This conclusion also is consistent with judicial recognition that, except in extraordinary circumstances, an agency or officer with rule-making authority is accorded wide discretion in determining whether to make rules in a particular area, and the agency’s or officer’s decision in that respect will be overturned only where it is arbitrary and capricious. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 507, 39 P.3d 961 (2002). In a similar vein, where an agency or officer promulgates a rule, the rule will be held invalid only if it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with statutory rulemaking procedures, or is arbitrary and capricious. RCW 34.05.570(2)(c); *Rios*, 145 Wn.2d at 491.

Based on the language of RCW 29A.04.611 and the above considerations to which courts look in endeavoring to discern legislative intent, I conclude that the statutory language about which you inquire gives the secretary considerable discretion in determining whether to promulgate rules and what particular rules to promulgate.³

This opinion represents my considered legal judgment on the question that you have asked. I hope it will assist you.

Sincerely,

MAUREEN HART
Solicitor General

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³ Although you did not specifically inquire as to the meaning of the term “shall” in that portion of RCW 29A.04.611 listing provisions for rule-making, my analysis and conclusion would be the same. That is, whether rules with respect to such provisions are necessary and appropriate would be a matter within the secretary’s properly exercised discretion.